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No. 06-151

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BERNARD L. ROTTSCHAEFER, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a physician denied a fair trial in a criminal prosecution for drug distribution under 21 U.S.C. §841(a)(1) when the parties frame and argue the issues under a Government interpretation of the "legitimate medical purpose" rule of 21 C.F.R. §1306.04 that equates the criminal standard ("outside the course of professional practice") with the civil "standard of care"?

2. Has the circuit court's factors test to evaluate new trial motions under Rule 33 supplanted the language of the Rule so as to deny a new trial even when the interest of justice requires it?

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INTEREST OF *AMICUS CURIAE* [1]

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. AAPS has many members who fear overzealous prosecution by the federal government despite complying fully with applicable state laws and otherwise engaging in the lawful practice of medicine. AAPS is

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

dedicated to defending the practice of private and ethical medicine so that physicians may best serve their patients without interference by third parties. AAPS has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals.

Amicus has a direct and vital interest in the issues presented to this Court based on the effect of federal interference with medical practice that is lawful under applicable state regulation.

SUMMARY OF ARGUMENT

Federal prosecutors are increasingly encroaching on the state regulation of medicine, in violation of principles of federalism. The prosecution below of Dr. Bernard Rottschaefer, a respected general practitioner who occasionally treated pain, disrupted the delicate federal-state balance by supplanting the regulatory scheme of a state with an uninformed federal jury's view of the proper standard of care. Medical practice, including the treatment of pain, is fully regulated by the states but federal prosecutions are increasingly intruding into the state domain. This Court should grant Dr. Rottschaefer's Petition and limit federal prosecutions to their proper role.

Petitioner Dr. Rottschaefer's practice was typical of thousands nationwide. He practiced medicine in the Commonwealth of Pennsylvania, in good standing with the Pennsylvania State Board of Medicine. Though the learned and experienced medical board allowed Petitioner to practice, a federal prosecutor untrained in medicine did not. The federal government could have revoked Petitioner's ability to prescribe controlled substances, or it could have complained to the Pennsylvania State Board of Medicine and thereby permitted an educated review of the facts. Instead, the federal prosecutor presented a spiced-up tale of sex-for-drugs for a lay jury in procuring a guilty verdict.

The sex-for-drugs story was a complete lie. Seventy-two (72) detailed letters were written during the prosecution by the government's key witness, Jennifer Riggle, to her then-boyfriend, and they were not made available to the defense until after the conviction. In 22 of those letters, Riggle explained contemporaneously how her false testimony would enable her to receive reduced sentences for drug-related crimes. Riggle wrote, "They're saying he was bribing patients with sex for pills, but it never happened to me. DEA said they will cut my time for a good testimony. I don't want to be a snitch but what should I do?" Pet. App. 44a. Other drug abusers, who knew Riggle and each other, likewise testified to the sex-for-drugs story.

This case illustrates why trained medical boards, not lay juries, are the appropriate entity for reviewing care provided by physicians. Yet this prosecution, and an increasing number like it, reflect usurpation by the federal government of state regulation of the practice of medicine.

Almost every physician who legitimately treats pain, even if only occasionally, could be targeted, indicted and unjustly convicted by federal prosecutors in a similar manner. Physicians rely on the state regulatory system to define the parameters of treating pain in patients. Trained review panels, not a lay jury of untrained citizens, are essential to the process. Allowing and affirming convictions like that below transforms medical care into a field regulated by federal prosecutors rather than by the States.

Rule 33 of the Federal Rules of Criminal Procedure, as written, supports overturning this conviction on the grounds that the sex-for-drugs testimony was utterly false. But Rule 33 was not applied below as written. Instead, it has been replaced by a judicially created test that impedes overturning a conviction based on discovery of false testimony if it can be described as merely cumulative. At trial, Petitioner knew that the sex-for-drugs tale was false and attempted to challenge it,

but lacked the evidence of the letters. Yet without even holding a hearing to consider the letters, the trial judge denied Petitioner's motion for a new trial, and the appellate court below upheld this find on the basis that the evidence of perjury by the key witness was "merely cumulative or impeaching." *United States v. Rottschaefer*, 2006 U.S. App. LEXIS 10504, *9 (3d Cir. Apr. 27, 2006). Such distinction is nowhere to be found in Rule 33 itself.

John Tierney of the New York Times commented on this case:

> The agents and prosecutors are supposed to be experts at detecting liars, and they had far better investigative tools available to them than Rottschaefer did. Yet they apparently weren't careful enough or shrewd enough to see through Riggle's story. If they don't deserve prison time for that mistake, neither does her doctor.

John Tierney, "Sex, Lies and OxyContin," N.Y. Times A5 (Jan. 24, 2006). Yet the trammeling of federalism and use of perjured testimony in order to convict resulted in a gross injustice for the good doctor, and over-deterrence for many like him.

ARGUMENT

I. THIS AND SIMILAR FEDERAL PROSECUTIONS OF PHYSICIANS VIOLATE FEDERALISM BY INTERFERING WITH THE STATE REGULATION OF MEDICINE.

The prosecution below reflects a growing trend, unlikely to be fixed without this Court's intervention, to empower federal juries to dictate the medical standard of care. This violates federalism and contravenes holdings of this Court. "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government." *United States v. Linder*, 268 U.S. 5, 18 (1925).

States, not federal juries, regulate the practice of medicine. States, not the federal government, supervise the practice of medicine. This was reiterated most recently by the Supreme Court in *Gonzales v. Oregon*. "The Government, in the end, maintains that the prescription requirement delegates to a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. **The text and structure of the [federal law] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.**" *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (emphasis added).

But that unconstitutional "radical shift" in power is precisely what occurred in this prosecution of Petitioner Bernard Rottschaefer, M.D., and an increasing number of similar prosecutions.[2] A "single executive officer"—a federal prosecutor—usurped the power of an entire state medical board and regulatory system by indicting a physician for practicing medicine in a manner of which the federal prosecutor disapproved. All physicians are deeply influenced and deterred by such a prosecution, and they alter their own practices to avoid meeting the same dire fate. With respect to the subject matter of the prosecution, the occasional treatment of pain, the state medical board becomes a nullity by virtue of the decision of a "single executive officer."

This "radical shift" is not repaired by virtue of a jury passing judgment on the physician's conduct and deciding that he acted with "no legitimate medical reason." *Rottschaefer*, 2006 U.S. App. LEXIS 10504, *6. Review of a physician's medical judgment is within the domain of the state medical board rather than a jury untrained in medicine. A prosecu-

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[2] Petitioner cites many similar prosecutions in his Petition before this Court. *See Rottschaefer Petition for a Writ of Certiorari* at 19-20.

tor's indictment of one physician inevitably frightens other physicians away, even though they practice medicine with the full approval of the state regulatory system.

State courts, in contrast with federal courts, have recognized the inappropriateness of submitting a medical dispute to a jury as a criminal case. For example, Dr. Stan Naramore administered large quantities of painkillers to two patients who subsequently died, and he was then convicted of murder by a jury. On appeal, the Supreme Court of Kansas observed that "the jury apparently found, beyond a reasonable doubt, that Dr. Naramore's actions were totally outside appropriate medical practice." *State v. Naramore*, 25 Kan. App. 2d 302, 322 (1998). "Having found that, [the jury] then apparently found there was no reasonable doubt that the source of his actions was homicidal intent." *Id.* Yet the Supreme Court of Kansas properly overturned the conviction. It found that where, as in the trial of Petitioner Rottschaefer below, there is a bona fide dispute in the medical community, then reasonable doubt about criminal intent exists as a matter of law. "[T]here is a reason why there has yet to be in Anglo-American law an affirmed conviction of a physician for homicide arising out of medical treatment based on such highly controverted expert evidence as here." *Id.*

A jury is even less "suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards'" than a court is. *Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting) (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 (1983) (O'Connor, J.)).

By intent and effect, the actions of the federal government in this type of prosecution completely supersede and interfere with the authority of the state medical boards. These prosecutions violate well-established principles of federalism because they "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory v. Ashcroft*,

501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "[I]t is incumbent upon the federal courts to be certain of Congress' intent" before infringing on the state regulation of medicine. *Id.* (quotation marks and citation omitted).

This Court, in *United States v. Morrison*, invalidated federal interference in "criminal law enforcement . . . where States historically have been sovereign." 529 U.S. 598, 613 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)). *See also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

Physicians treating pain, as Petitioner occasionally did, would now be well-advised to seek approval for their practices from the local federal prosecutor rather than the state medical board. This plainly violates "the federal-state balance" without congressional mandate. *Bass*, 404 U.S. at 349. *See also Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 2222 (2005) (O'Connor, J., dissenting) ("The Constitution, we said, does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'") (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

The federal government retains full authority to revoke a DEA registration that is being misused by any physician, in sharp contrast to the conviction upheld by this Court in *United States v. Moore*, 423 U.S. 122 (1975). In *Moore*, the federal remedy of revocation of his DEA registration was *not* an option because "[r]egistration was mandatory for practitioners with state licenses" except under inapplicable excep-

tions. *Id.* at 138 n.15. In this case, the DEA could have ended at any time the ability of Petitioner to prescribe controlled substances simply by terminating his registration. That would accomplish legitimate federal goals while respecting federalism.

In sum, the decision below eviscerated the state's traditional control and regulation of physicians under its jurisdiction. Congress never authorized such a complete disregard of state oversight of medical practice, an area in which "States lay claim by right of history and expertise." *Gonzales v. Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)). The importance of the federalism issue at stake supports granting the Petition for *Writ of Certiorari* here.

II. REVIEW IS NECESSARY TO CLARIFY THE PROPER STANDARD FOR A NEW TRIAL BASED ON PERJURY.

Integrity in prosecutions has eroded due to the inability to obtain a new trial even where, as here, perjury of a highly prejudicial nature is uncovered and demonstrated post-trial. *See, e.g.*, Brian Murray and Joseph C. Rosa, "He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 *N.E. J. on Crim. & Civ. Con.* 1 (Winter 2001). The judicial permissiveness towards prosecutorial perjury stands in stark contrast to the exclusionary rule, which flatly prohibits the use at trial of much evidence improperly seized. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). It seems ironic that while the truth is excluded, falsehoods are allowed.

Rule 33(a) of the Federal Rules of Criminal Procedure provides that a new trial may be granted upon defendant's motion "if the interest of justice so requires." The post-conviction revelation that the defendant did not give drugs for sex after all, which was the explosive testimony exploited by

the government to procure the conviction, should easily satisfy this express requirement of Rule 33(a).

The court below mistakenly held that "cumulative or impeaching" evidence does not trigger a new trial under Rule 33(a). *Rottschaefer*, 2006 U.S. App. LEXIS 10504, *9. Yet as explained by the Seventh Circuit, "Nothing in the text or history of Rule 33, or of the cognate civil rule (Rule 60(b)), supports a categorical distinction between types of evidence; and we cannot see the sense of such a distinction." *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir.), *cert. denied*, 500 U.S. 927 (1991).

A. There is Heightened Urgency to Deter Perjury in Criminal Trials in Light of the Increasingly Permissive and Conflicting Standards.

Appellate courts are besieged with convictions procured by perjury, yet have only conflicting standards to apply. The First Circuit, for example, has encountered perjury by prosecution in at least three different cases in the past seven years. *See United States v. Gonzales-Gonzales*, 258 F.3d 16 (1st Cir. 2001); *United States v. Josleyn*, 206 F.3d 144 (1st Cir. 2000); *United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999).

Amid the uncertainty in the proper standard, perjury runs amok. The Fourth Circuit has faced an epidemic of perjury in prosecutions challenged on appeal, including at least five appellate cases in the last seven years on this issue. *See United States v. Maynard*, 77 Fed. Appx. 183 (4th Cir. 2003); *United States v. King*, 71 Fed. Appx. 192 (4th Cir. 2003); *United States v. Gullett*, 62 Fed. Appx. 554 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003); *United States v. Roberts*, 262 F.3d 286 (4th Cir. 2001), *cert. denied*, 535 U.S. 991 (2002); *United States v. McGrady*, 1999 U.S. App. LEXIS 2395 (4th Cir.), *cert. denied*, 528 U.S. 855 (1999). In *King*, the perjury was so overwhelming that "in thirty years of practice and ten on

the bench, [the trial judge] had never had 'less confidence' in a verdict." 71 Fed. Appx. at 194.

The permissive approach towards perjury allows it to grow like a cancer amid the confusion about the proper standard. The Fifth Circuit struggled with the uncertainty to conclude only that it "arguably" adheres to the same probability standard for evidence of perjury as with other newly-discovered post-trial evidence. *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989). Seventeen years later, the standard is even murkier. In the absence of a clear rule as a bulwark against the use of perjury by prosecutions, false testimony will spread further.

B. The Decision Below Conflicts with Rulings of This Court.

The decision below permitting a conviction to stand despite perjury by a key government witness conflicts with this Court's rejection of prosecutorial deception in an analogous situation. *Banks v. Dretke*, 540 U.S. 668 (2004). There the defendants suffered from the concealment of exculpatory *Brady* material and perjured testimony by government witnesses, and sought relief on that basis. The Court reiterated its holding in *Kyles v. Whitley* that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 698 (quoting *Kyles*, 514 U.S. 419, 435 (1995)). Surely the revelation that the sex-for-drugs claim of the key witness was a lie does cast this whole case in "a different light."

The burden of proof does not shift to the defendant to prove his innocence. "'A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" *Banks*, 540 U.S. at 698-99 (quoting *Kyles*, 514 U.S. at 434-435). *See also Fahy v. Connecticut*, 375 U.S. 85,

86-87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of **might have** contributed to the conviction.") (emphasis added).

This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added, citations omitted). That knowledge should be imputed to prosecutors where, as here, the falsity of the testimony should have been known by the prosecutorial team. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. The plea bargain below induced the government's star witness to tell the sensational lie of sex-for-drugs. As John Tierney of the New York Times put it, "The agents and prosecutors are supposed to be experts at detecting liars, and they had far better investigative tools available to them than Rottschaefer did. . . . If they don't deserve prison time for that mistake, neither does her doctor." John Tierney, "Sex, Lies and OxyContin," N.Y. Times A5 (Jan. 24, 2006).

Where, as here, the deception is by a star witness for the prosecution, it is "inescapable" that a new trial is warranted. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor") (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Defendants have a right to acquittal if there is

reasonable doubt on any element of a criminal charge, and prosecutorial use of perjury to obtain a conviction impermissibly infringes on this right. *See* U.S. CONST., AMEND. V.

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

Respectfully submitted,

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